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IN THE

Supreme Court of the United States

October Term, 1956

No. 578

E. F. DREW & CO., INC.,

Petitioner,

against

FEDERAL TRADE COMMISSION,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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FEDERAL TRADE COMMISSION,

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, by its counsel, prays that a writ of certiorari may issue to review the decree of the United States Court of Appeals for the Second Circuit, affirming and modifying the Order of the Federal Trade Commission.

Opinions Below

The opinion of the Federal Trade Commission (not yet reported) is printed in the transcript (pp. 27-38); the opinion of the Court of Appeals is reported in 235 F. 2d 735, and is printed herein as Appendix A.

Jurisdiction

The decree of the Court of Appeals, affirming and modifying the Cease and Desist Order of the Federal Trade Commission, is dated and was entered on August 20th, 1956. Appendix B, *infra*, p. 12a.

The jurisdiction of this Court is invoked under 28 United States Code, Section 1254(1).

Questions Presented

1. Whether Section 15(a)(2) of the Federal Trade Commission Act (effective March 16th, 1950), 15 U. S. C. Section 55(a)(2), as construed and applied here, is violative of the first amendment of the Constitution of the United States, as constituting an abridgment of the freedom of speech, in that such Act of Congress, in adding to and affecting Sections 12 and 15 of the Federal Trade Commission Act, 15 U. S. C. Sections 52 and 55, in the advertising of oleomargarine, eliminates the requirement of establishing that the advertisements involved are of a false and misleading character to sustain a Cease and Desist Order under Section 5 of the Federal Trade Commission Act, 15 U. S. C. Section 45.

2. Whether Section 15(a)(2) of the Federal Trade Commission Act, as construed and applied here, is violative of the fifth amendment of the Constitution of the United States, as being too ambiguous to be enforcible.

3. Whether Section 15(a)(2) of the Federal Trade Commission Act, under proper construction, eliminates in the case of oleomargarine advertising, the requirements of proof of capacity and tendency to deceive theretofore required to sustain a Cease and Desist Order under Section 5, 12 and 15 of the Federal Trade Commission Act.

Constitutional Provisions, Statutes and Regulations Involved

Constitution of the United States:

Amendment 1—Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment 5—No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of

life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Article 1, Section 8, Subdivision 3—The Congress shall have power (3) to regulate commerce with foreign nations, and among the several States and with the Indian tribes.

Federal Trade Commission Act:

Sec. 5(a)(1) Unfair methods of competition in commerce, and unfair or deceptive acts or practices in commerce, are hereby declared unlawful.

(6) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, * * * from using unfair methods of competition in commerce and unfair or deceptive acts or practices in commerce.

Sec. 12(a) * * * It shall be unlawful for any person, partnership or corporation to disseminate, or cause to be disseminated, any false advertisement * * *

(1) By United States mails, or in commerce by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly the purchase of food, drugs, devices or cosmetics; or

(2) By any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in Commerce of food, drugs, devices, or cosmetics.

Sec. 12(b) The dissemination or the causing to be disseminated of any false advertisement within the

provisions of subsection (a) of this action shall be an unfair or deceptive act or practice in Commerce within the meaning of section 5.

"Sec. 13(a) Whenever the Commission has reason to believe * * *

(1) That any person, partnership, or corpis engaged in, or is about to engage in, the dissemination or the cause of the dissemination of any advertisement in violation of section 12, and

(2) That the enjoining thereof pending the issuance of a complaint by the Commission under section 5, and until such complaint is dismissed by the Commission or set aside by the Court on review, or the order of the Commission to cease and desist made thereon has become final within the meaning of section 5, would be to the interest of the public, the Commission by any of its attorneys designated by it for such purpose may bring suit in a district court of the United States or in the United States court of any Territory, to enjoin the dissemination or the cause of the dissemination of such advertisement.

Sec. 14(a) Any person, partnership, or corporation, who violates any provision of Section 12(a) shall, if the use of the commodity advertised may be injurious to health because of results from such use under the conditions prescribed in the advertisement thereof, or under such conditions as are customary or usual, or if such violation is with intent to defraud or mislead, be guilty of a misdemeanor, and upon conviction shall be punished by a fine of not more than $5,000

or by imprisonment for not more than six months, or by both such fine or imprisonment.

Sec. 15. For the purposes of sections 12, 13 and 14 * * *

(a)(1) The term 'false advertisement' means an advertisement, other than labeling, which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations or material with respect to consequences which may result from the use of the commodity to which the advertisement, or under such conditions as are customary or usual. No advertisement of a drug shall be deemed to be false if it is disseminated only to members of the medical profession, contains no false representation of a material fact, and includes, or is accompanied in each instance by truthful disclosure of, the formula showing quantitatively each ingredient of such drug.

(2) In the case of oleomargarine or margarine an advertisement shall be *deemed misleading* in a material respect if in such advertisement representations are made or suggested by statement, word, grade designation, design, device, symbol, sound, or any combination thereof, that such oleomargarine or margarine is a dairy product, except that nothing contained herein shall prevent a truthful, accurate, and

full statement in any such advertisement of all the ingredients contained in such oleomargarine or margarine. (Emphasis supplied.)

(f) For the purposes of this section * * * the term "oleomargarine" or "margarine" includes—

(1) All substances, mixtures, and compounds known as oleomargarine or margarine;

(2) All substances, mixtures, and compounds which have a consistence similar to that of butter and which contain any edible oils or fats other than milk fat if made in imitation or semblance of butter. (15 U. S. C. §§52-55)

Definitions and Standards for Food, Title 21, Part 45 —Oleomargarine, Margarine. Definitions and Standards of Identity:

Sec. 45.1 — Oleomargarine, margarine; identity; label statement of optional ingredients. (a) Oleomargarine, margarine is the plastic food prepared with one or more of the optional fat ingredients named in subparagraph (1) (i), (ii), (iii), and (iv) of this paragraph, as follows:

(2) One of the articles designated in subdivision (i), (ii), (iii), (iv), (v) or (vi) of this subparagraph is intimately mixed with the fat ingredient or ingredients. The ingredients named in subdivisions (i), (ii), (iii), (iv), and (v) are pasteurized and then subjected to the action of harmless bacterial starters. The term "milk" as used in this subparagraph means cow's milk.

(i) Cream.

(ii) Milk.

(iii) Skim milk.

(3) In the preparation of oleomargarine one or more of the following optional ingredients may also be used.

(vi) Butter.

Statement of the Case

Before stating what this case is, it might be helpful to state what it is not. This is not a situation in which the Petitioner seeks review because it has been found that its advertisements are false or misleading. We seek review bcause it has been held that our advertisements must be forbidden even though they have not been found to be false or misleading.

Petitioner, a manufacturer of oleomargarine, disseminated in interstate commerce certain advertisements concerning its oleomargarine sold under the brand name "Farm Queen". These advertisements, although containing statements clearly indicating that the product was made in part, from vegetable oils, contained the following phrases:

1. "churned to delicate, sweet creamy goodness";
2. "country fresh";
3. "the same day to day freshness which characterizes our other dairy products."

The Federal Trade Commission, on the 19th of October, 1953, filed a complaint which took exception to the contents of the petitioner's advertising contending that each of the above expressions, as well as the use in advertising of the trade-name "Farm Queen" constitutes false and misleading advertisements, as such term is defined in Sections 15(a)(1) and 15(a)(2), of the Federal Trade Commission Act, in that they serve as suggestions that the petitioner's product is a dairy product, and hence, that a Cease and Desist Order prohibiting such advertising should issue. A hearing was held, after service by the Petitioner of an answer, denying essential allegations of the complaint, at which hearing the Hearing Examiner held that under Section 15(a)(2), of the Federal Trade Commission Act, recently enacted, it was *unnecessary to* find that the advertisements, a condemnation of which was sought, were false or misleading or confusing. No finding was made that any of the questioned terms was false. It was not claimed, nor was it found that petitioner's margarine was not churned, or that it was not delicate, or sweet, or creamy, or good. The contention was not made nor was a finding made, that the margarine did not come from the country, or that it was not fresh, or that it was not "country fresh". It was not claimed or established that the advertisements involved were misleading or had the capacity or tendency to deceive or to confuse. It was not even found that the product advertised was not a dairy product.

The Hearing Examiner held that under Section 15(a)(2), if the advertisement contained *any expression* which *suggested* that the product was a dairy product, its distribution must be curtailed even though the advertisement as a whole, would not be objectionable in any sense, and

even though the product advertised is, or might be a dairy product. The Examiner prohibited the use of the first and third expressions above set out, holding that the questioned terms suggested that the product was a dairy product but refused to condemn the expression "country fresh" or the trade-name "Farm Queen," holding that those expressions did not suggest that the product was a dairy product.

Appeals from the Hearing Examiner's decision were taken both by Petitioner and Counsel supporting the complaint, to the Federal Trade Commission, which in essence upheld the decision of the Hearing Examiner, but added to the expressions to be condemned, the term "Country Fresh" and likewise held that under Section 15(a)(2), a Cease and Desist Order would issue, even though there was no proof that the advertisements in question were false or misleading or confusing and even though no finding to that effect was made and that the usual requirement under Section 5 of the Federal Trade Commission Act of a finding of capacity and tendency to deceive, while necessary in other advertising fields, was no longer required in the case of oleomargarine advertising, in view of the newly enacted Section 15(a)(2). (Transcript, pp. 27-38.)

Petitioner's appeal to the Court of Appeals, in which Petitioner contended not only that the Federal Trade Commission's construction of Section 15(a)(2) was erroneous, but also that if such construction were correct, then Section 15(a)(2), violated the first and fifth amendment of the Constitution resulted in an affirmance of the Federal Trade Commission order and in a modification not here material. Both the Federal Trade Commission and the Court of Appeals have held that if an advertisement contains *any* expression which *suggests* that the product is a dairy prod-

uct, then the advertisement as a whole, by the Congressional Enactment in question, *is deemed misleading* and that no inquiry can be made by way of determining whether the advertisement actually does possess the capacity and tendency to deceive, and that Congress has found as a fact, that the use of *any* expressions which suggest that oleomargarine is a dairy product, necessarily makes the advertisement as a whole, misleading, and that the Federal Trade Commission has no power to question this advance fact finding by Congress, and must issue a Cease and Desist Order without at all considering whether the advertisement in reality is misleading or confusing (Appendix A, pp. 7a-8a, *infra*). The opinion of the Court of Appeals necessarily sustains the Hearing Examiner's holding that under Section 15(a)(2), it was unnecessary to prove that the product advertised was not a dairy product because Congress had so found. (Transcript, p. 18.)

In the Court of Appeals, Petitioner argued (1) that the first amendment deprived Congress of the power to find as a fact, in advance of an actual advertisement, what particular words will necessairly result in misleading the public; and (2) in addition, that such a Congressional attempt to do so, involved a usurpation of the Federal Court right to construe the Constitution of the United States.

It was also argued that Section 15(a)(2) of the Federal Trade Commission Act was ambiguous, Petitioner having pointed out: (a) that while "oleomargarine" is defined in Section 15(f)(1)(2), as being any product resembling butter which contains any edible oil other than milk fat, the term "dairy product" was not defined at all, even though oleomargarine by definition adopted under the Food and Drug Act, obviously was a dairy product, since it may contain milk or butter to the extent of 99% (*Defini-*

tion and Standards For Food, Title 21 Part 45:1.), and (b) that the term dairy product as understood by the public includes margarine (Transcript, p. 37) as a consequence of which a statute which forbids suggesting that margarine is a dairy product would in the public mind prohibit the making of a truthful statement, which would be incomprehensible to the public.

Judge Waterman, with unanimous concurrence, held with respect to our free speech contentions:

> 1. That Congress *has found* that an advertisement which contains *any* expression which suggests that margarine is a dairy product, necessarily makes the advertisement misleading, which congressional advance finding, since it is not unreasonable, *precludes* a Judicial inquiry into its correctness, as respects any particular advertisement (Citing *Carolene Products* v. *United States,* 1944, 323 U. S. 18, 23, 27-32).
>
> 2. That Congress has a right to choose any method it deems necessary to effect its purpose of preventing the substitution of margarine for a dairy product, as long as the method adopted (speech limitation in this case) is reasonably related to the end sought. (Citing *Carolene.*)
>
> 3. That the limitation of speech here found by Congress to be necessary to avoid the danger of public deception, is only slight and *incidental.* (No citation.)

Reasons for Allowing the Writ

This petition, we believe is the first application to this Court challenging the constitutionality of the congressional enactments dealing with advertising of oleomargarine. Particularly we refer to Section 15(a)(2) of the Federal Trade Commission Act, which by specifically defining a particular class of words which shall be deemed misleading in the case of oleomargarine advertising, and which is not applicable to advertising of other foods, has in effect prohibited the use in commercial advertising of specific words, whether the advertisement in question containing such words be misleading or not. At least so the section has been construed by the Court of Appeals.

It is submitted, that the enactment challenged violates the first amendment of the Constitution, which by direct language forbids congressional abridgment of the freedom of speech and is violative of the fifth amendment in that the language of the act of Congress is so ambiguous as to be unenforcible.

We must state that the ambiguity contention has been made and was rejected in another case decided by a Court of Appeals, to wit; in the case of *Reddi Spread Corporation* v. *Federal Trade Commission*, 3d Cir. 1956, 229 F. 2d 557. We must also state however, that the freedom of speech question was not raised in the latter case.

We pray that this writ be granted for the reasons that:

A.—The holding of the Court of Appeals to the effect that Section 15(a)(2) of the Federal Trade Commission Act does not violate the first amendment of the Constitu-

tion of the United States, constitutes the determination of a federal question in conflict with applicable decisions of this Court; or

B.—That the holding of the Court of Appeals constitutes a determination of an important federal question, which has not been but should be settled by this Court; namely whether Section 15(a)(2) of the Federal Trade Commission Act violates either the First or Fifth Amendments of the Constitution of the United States; and

C.—That the construction given by the Court of Appeals to Section 15(a)(2) of the Federal Trade Commission Act constitutes a determination of an important federal question which has not been but should be settled by this Court, namely whether Section 15(a)(2) of the Federal Trade Commission Act, as properly construed, does eliminate the usual requirement of proof of capacity and tendency to deceive to sustain a cease and desist order under Section 5 of the Federal Trade Commission Act.

We assert with confidence that the first two grounds stated in the Opinion of the Court of Appeals, above set forth, have no application to the first amendment; that the *Carolene* case cited applies only to the due process question involving property rights under the fifth amendment, and has no application whatsoever to speech abridgement questions under the first amendment.

Indeed, it is material to note, that a majority of this Court did not apply this rational basis doctrine to the first amendment, even though it was given rather vigorous support in the concurring opinion of Mr. Justice Frankfurter in *Dennis* v. *United States* (341 U. S. 494, 539). On the other hand this Court has clearly stated that the

Court's duty and power to examine into the factual elements of free speech questions can not be limited by the legislative branch of our government, under the rational basis theory. (*Thomas* v. *Collins,* 323 U. S. 516, 530; *Heinden* v. *Lowry,* 301 U. S. 242, 258.)

We presume that the statement in the opinion of the Court of Appeals to the effect that limitation of speech in this case is slight and incidental refers to decisions holding that it is not unconstitutional to enjoin an unlawful course of conduct or a result simply because this incidentally entails communication restrictions such as picketing or solicitation. These decisions, we maintain, are distinguishable for Section 15(a)(2) does not prohibit an Act or result which incidentally involves speech; it is a *direct restriction of language content.* We surmise also that the Court had in mind the following dictum of Chief Judge Learned Hand, adopted by Chief Justice Vinson, in the majority opinion in the *Dennis* case:

> "'In each case (Courts) must ask whether the gravity of the "evil", discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger' * * *." (*Dennis* v. *United States,* 341 U. S. 494, 510)

It would seem clear from the Opinion of Judge Waterman, that the dictum of the *Dennis* case has been misconstrued. To justify speech limitation, not only must the restriction be necessary to avoid the evil, but the evil must be of *sufficient gravity* to warrant the free speech invasion. Surely the likelihood of public deception involved in margarine advertisements (where there is no finding of tendency to deceive) can hardly be mentioned in the

same breath with the danger to national survival, which was the concern of the *Dennis* case. Moreover, it will be noticed that the appraisal of necessity to avoid public deception, was the *previous estimate of Congress,* not the judicial appraisal which we believe the *Dennis* case holds to be essential to legislative validity as against free speech.

The factual background explains the importance of the speech privilege to petitioner which we assert Congress has no constitutional right to destroy. If we are to advertise our product at all it is essential that we extol its qualities. Since margarine is a butter substitute, we naturally want to show that it possesses the same properties that butter has. In doing so we necessarily will call butter to mind or suggest butter to the public. We submit the Constitution gives us the right to do so, as long as what we do, does not, as a *judicially determined fact,* involve likelihood of deception.

We may anticipate the Court's familiarity with its dictum that commercial advertising does not come within first amendment protection (*Valentin* v. *Christensen,* 1942, 316 U. S. 52, 54; *Breard* v. *Alexandria,* 1951, 341 U. S. 622, 641-642). It is to be noted that those decisions concern only questions of competing rights involved in methods of *speech communication* and did not at all deal with *speech content.* While this argument that the first amendment does not apply to commercial advertising was vigorously made by the Respondent, and opposed by Petitioner (citing *Thomas* v. *Collins,* 323 U. S. 516, 531; *Burstyn* v. *Wilson,* 343 U. S. 495, 504; *Senn* v. *Tile Layers Union,* 301 U. S. 468, 481, 482; *Building Service Union* v. *Gazzam,* 339 U. S. 532, 536, 537; as holding that the first amendment protects speech used in business or economic activity), the

Court of Appeals did not take the view that commercial advertising, as such, was not protected by the first amendment (Appendix p. 7a, *infra*).

CONCLUSION

The writ of certiorari should be issued.

Dated, New York, New York, November 14, 1956.

Respectfully submitted,

SAMUEL J. LOEWENSTEIN,
Attorney for Petitioner.

APPENDIX A

Decision of Circuit Court

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 210—October Term, 1955.

(Argued February 9, 1956 Decided July 13, 1956.)

Docket No. 23724

E. F. DREW & CO., INC.,

Petitioner,

against

FEDERAL TRADE COMMISSION,

Respondent.

Before:

MEDINA, LUMBARD and WATERMAN,

Circuit Judges.

Petition for review of an order of the Federal Trade Commission pursuant to 15 U. S. C. §52 and §55(a)(2) directing petitioner, an oleomargarine manufacturer, to cease and desist from using certain phrases in the advertising of its oleomargarine.

Modified and affirmed.

Appendix A

SAMUEL J. LOEWENSTEIN, New York City, *for petitioner.*

EARL W. KINTNER, General Counsel, Robert B. Dawkins, Assistant General Counsel, Jno. W. Carter, Jr., Alvin L. Berman, Attorneys. Attorneys for Federal Trade Commission, Washington, D. C., *for respondent.*

WATERMAN, *Circuit Judge*:

Petitioner, E. F. Drew & Co., Inc., seeks review of an order of the Federal Trade Commission directing it to cease and desist from using certain phrases in the advertising of its oleomargarine. Although petitioner questions the conclusions arrived at by the Commission, there is no dispute as to the following facts: Petitioner, a Delaware corporation having its principal place of business in New York, sells and distributes oleomargarine under the name "Farm Queen" to dairies and milk dealers in several states. In order to aid these milk dealers in the sale of its margarine to consumers, petitioner distributes in the mails and in interstate commerce a variety of circulars, letters, and other advertisements. These advertisements of petitioner's oleomargarine contained, until discontinued by petitioner, the expressions "churned to delicate, sweet creamy goodness," "country fresh," and "the same day-to-day freshness which characterizes our other dairy products." The complaint alleged that these and expressions of similar import were "misleading in material respects and constitute false advertisements, as such term is defined in

Section 15 of the Federal Trade Commission Act." The hearing examiner found that the statements "churned to delicate, sweet creamy goodness" and "the same day-to-day freshness which characterizes our other dairy products" were representations that petitioner's oleomargarine is a dairy product. The Commission modified this finding by adding the expression "country fresh," and affirmed the finding as modified. The Commission adopted the other findings of the examiner, affirmed the initial decision, and issued its order to cease and desist. This court has jurisdiction over the petition for review under 28 U. S. C. §1331 and 15 U. S. C. §45(c) and (d), and the venue is proper under 15 U. S. C. §45(c).

This case raises questions concerning the construction and constitutionality of §15(a)(2) of the Federal Trade Commission Act, 15 U. S. C. §55(a)(2), and is the second such case to reach a Court of Appeals. The first, *Reddi-Spred Corporation* v. *Federal Trade Comm'n*, 3 Cir. 1956, 229 F. 2d 557, was decided in favor of the Commission in all respects. However, the questions presented here, though similar to those involved in the *Reddi-Spred* case, include somewhat different arguments. The questions presented by this case may be stated as follows: (1) In a proceeding for violation of §§12 and 15 of the Federal Trade Commission Act, 15 U. S. C. §§52 and 55, involving oleomargarine advertisements, is it necessary to establish that the acts and practices involved are of a false and misleading character, as is required in a proceeding for violation of §5 of the Act, 15 U. S. C. §45? (2) If §15(a)(2) of the Act, 15 U. S. C. §§55(a)(2), is construed so as to make such proof unnecessary, is that subsection constitutional? (3) Are the findings of fact, upon which the order to cease and

desist is predicated, supported by substantial evidence? These questions will be considered *seriatim*.

I

Petitioner contends that the Commission must establish that petitioner's advertisements have the tendency or capacity to deceive consumers, *i.e.*, are of a false and misleading character, and hence that they would be likely to induce the purchase of the oleomargarine under the mistaken belief that it was a dairy product. The Commission, conceding that it has made no such finding, believes that such a finding is not required in a proceeding for violation of §15(a)(2). We therefore turn to an examination of the pertinent statutory language.

Section 12(a), 15 U. S. C. §52(a), makes it "unlawful for any * * * corporation to disseminate, or cause to be disseminated, any false advertisement—(1) By United States mails, or in commerce by any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of food * * * " Section 12(b), 15 U. S. C. §52(b), provides that "The dissemination or the causing to be disseminated of any false advertisement within the provisions of subsection (a) of this section shall be an unfair and deceptive act or practice in commerce within the meaning of section 5." Section 5, 15 U. S. C. §45, authorizes the Commission to institute proceedings and in a proper case to issue a cease-and-desist order. Thus the Commission has the power and the duty to issue a cease-and-desist order whenever it finds, on the basis of substantial evidence: (1) that the advertisement is *dis-*

seminated by the mails or in commerce; (2) that the advertisement is *false;* and (3) that the advertisement is disseminated *"for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase of food* * * *" In this case the Commission has found, and petitioner concedes, that the advertisements involved were disseminated by the mails and in commerce, and that such dissemination was for the purpose of inducing, directly or indirectly, the purchase of its "Farm Queen" oleomargarine. It follows that we need only inquire whether the Commission has properly concluded that the expressions used in petitioner's advertising constitute "false advertisements."

Section 15(a)(1), 15 U. S. C. §55(a)(1), defining the term "false advertisement" as used in §12, 15 U. S. C. §52, provides that any advertisement which is misleading in a material respect is a "false advertisement." We now arrive at the crucial statutory provision, subsection (a)(2) of §15, 15 U. S. C. §55(a)(2). This subsection, in effect, provides a special definition of "false advertisement" for use in certain cases involving oleomargarine: "In the case of oleomargarine or margarine an advertisement shall be deemed misleading in a material respect if in such advertisement representations are made or suggested by statement, word, grade designation, design, device, symbol, sound, or any combination thereof, that such oleomargarine or margarine is a dairy product * * *" Since the word "suggested" modifies the word "representations," it is clear that any oleomargarine advertisement which *represents or suggests* in any manner that it is a dairy product is "misleading in a material respect," and hence, because of the provisions of §15(a)(1), is a "false advertisement" within the meaning of §12. Section 15(a)(2) of the Federal

Trade Commission Act clearly constitutes a finding by Congress that a representation that oleomargarine is a dairy product is misleading in a material respect and hence is a false advertisement. We therefore hold that the Commission, in a case coming within §15(a)(2), is relieved of the requirement of finding that the advertising is in fact false and misleading. *Reddi-Spred Corporation* v. *Federal Trade Commission*, 3 Cir. 1956, 229 F. 2d 557. We think the statutory language is so clear and unambiguous that we think it unnecessary to discuss the extended legislative history of §15(a)(2). See *Ex parte Collett*, 1949, 337 U. S. 55, 61; *United States* v. *Missouri Pacific R. Co.*, 1929, 278 U. S. 269, 278, and cases there cited. Suffice it to say that the legislative history supports in copious detail the construction we have given the statute.[1]

Petitioner also contends that the Commission is not authorized to issue a cease-and-desist order for violation of §15(a)(2), 15 U. S. C. §55(a)(2), but can issue such orders only for violation of §5, 15 U. S. C. §45. Petitioner's argument rests on the thesis that the definition of false advertisement set forth in subsections (a)(1) and (a)(2) of

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[1] Section 15(a)(2) was enacted in 1950 as part of a legislative compromise which resulted in the repeal of excise taxes which had been imposed on oleomargarine since 1886. Senator McCarthy, the sponsor of the amendment which is now §15(a)(2), stated that the purpose of §15(a)(2) was "to prevent any form of advertisement [of oleomargarine] which gives the impression, directly or by inference, that the consumer is buying butter." Cong. Rec., Jan. 6, 1950, pp. 128-129. The managers of the amendment in the House stated that its purpose was to make "any advertisement of oleomargarine or margarine misleading if such advertisement represents that oleomargarine or margarine is a dairy product * * *" H. R. No. 1731, 81st Cong., 2d Sess., p. 6, Cong. Rec., March 4, 1950, p. 2867. The legislative background is discussed in greater detail in the opinion of the Federal Trade Commission in this case, *In re E. F. Drew & Co., Inc.*, F. T. C. Docket No. 6126.

§15 applies only to §13 of the Act, 15 U. S. C. §53, which provides for preliminary injunctions, and §14, 15 U. S. C. §54, which creates criminal penalties. Examination of the statutory language demonstrates that petitioner's contention is unsound: the definitions in §15 are specifically stated to be "For the purposes of Sections 12, 13 and 14"; and §12 in turn provides that any violation of that section is a violation of §5.[2] We so stated in *Fresh Grown Preserve Corp.* v. *Federal Trade Comm'n*, 2 Cir. 1942, 125 F. 2d 917, 919. The Commission's action in issuing a cease-and-desist order under §5 as a sanction for violations of §§12 and 15 has been sustained in numerous cases. See, e.g., *Charles of the Ritz Distributors Corp.* v. *Federal Trade Comm'n*, 2 Cir. 1944, 140 F. 2d 683, 684.

II

Petitioner asserts that §15(a)(2), as we have construed it, is an unconstitutional abridgment of the freedom of speech guaranteed by the First Amendment. The Commission, relying on *Valentine* v. *Chrestensen*, 1942, 316 U. S. 52, 54; *Breard* v. *Alexandria*, 1951, 341 U. S. 622, 641-642; and *Pollak* v. *Public Utilities Comm'n*, D. C. Cir. 1951, 191 F. 2d 450, 457, rev'd on other grounds, 343 U. S. 451, replies that all commercial advertising is without the protection of the First Amendment. We think it sufficient to state that Congress can prohibit or control *misleading* advertising under the postal fraud statutes, *Donaldson* v. *Read Magazine*, 1948, 333 U. S. 178, 191, or under its

[2] See the exact language of §12(b), 15 U. S. C. §52(b). The interrelation of §§12, 13, 14 and 15 with §5 is further illustrated by the provision in §13(a), 15 U. S. C. §53(a), authorizing the Commission to enjoin the dissemination of an advertisement which violates §12 "pending the issuance of a complaint by the Commission under section 5 * * *"

commerce power, *American Medicinal Products* v. *Federal Trade Comm'n,* 9 Cir. 1943, 136 F. 2d 426, 427, without deprivation of First Amendment rights. There is no constitutional right to disseminate false or misleading advertisements.

Petitioner, however, contends that there is no proof and no finding that its advertisements were *in fact* false or misleading. But this finding has been supplied by Congress in the statute itself, which states that any representation or suggestion that oleomargarine is a dairy product is deemed to be misleading. Nor is such a finding unreasonable. Congress might well think that confusion, deception and substitution of oleomargarine for butter or other dairy products was a problem that deserved legislative action. The method selected by Congress to effect this purpose is a matter of legislative discretion, not subject to attack if reasonably related to the end sought. Cf. *Carolene Products Co.* v. *United States,* 1944, 323 U. S. 18, 23, 27-32.

Nor is the slight and incidental limitation of speech necessary to avoid the danger of public deception an infringement of the First Amendment. Petitioner remains free to advertise its product. It is prohibited only from representing or suggesting that its product is a dairy product. "It is not difficult to choose statements, designs and devices which will not deceive." *United States* v. *95 Barrels of Vinegar,* 1924, 265 U. S. 438, 443.

Petitioner also contends that §15(a)(2) "is so ambiguous as to render it unenforceable," objecting particularly to the lack of a definition of "dairy product." The Third Circuit has recently rejected a similar contention. *Reddi-Spred Corporation* v. *Federal Trade Commission, supra.*

We think the statute contains no ambiguity, but is expressed in plain and definite language. The term "dairy product," we think, must have been used in the sense of "made of milk or from some milk derivative." But whether or not that is so is not crucial here because everyone, and most assuredly petitioner, understands that the "dairy product" referred to insofar as this case is concerned is butter.

III

Petitioner's final contention is that there is no substantial evidence in the record to support the Commission's findings of fact.[3] Petitioner argues that margarine is "churned"; that Congress has used the word "churned" in defining oleomargarine in the Internal Revenue Code; that the word "creamy" as used in its advertisements connotes texture and not that the product contains cream; that the phrase "country fresh" is used metaphorically to describe the quality of its oleomargarine, etc. However, it is not our function to determine the truth of these claims or to determine the sense in which words are used, but only to determine whether the Commission's findings of fact are supported by substantial evidence. §5(c), 15 U. S. C. §45(c); *Independent Directory Corp.* v. *Federal Trade Commission,* 2 Cir. 1951, 188 F. 2d 468, 470; *Gelb* v. *Federal Trade Commission,* 2 Cir. 1944, 144 F. 2d 580, 582; *Armand Co.* v. *Federal Trade Commission,* 2 Cir. 1935, 78 F. 2d 707,

[3] Petitioner also contends that two surveys purporting to show public reaction to petitioner's advertisements were erroneously admitted in evidence. Neither the hearing examiner nor the Commission relied on the surveys in reaching their conclusion, and therefore their admission could not constitute prejudicial error.

707-708. Whether petitioner's advertisements represent or suggest that its oleomargarine is a dairy product is a question of fact for the Commission. *Leach* v. *Carlile*, 1922, 258 U. S. 138, 139-140.

We think that the Commission's finding that in petitioner's advertising "representations are made or suggested * * * that such oleomargarine * * * is a dairy product" is supported by substantial evidence. The expressions "churned" and "country fresh" have long been associated with butter, and their use in connection with petitioner's oleomargarine might suggest to some purchasers that its product had a composition and origin similar to butter, while the expression "the same day-to-day freshness which characterizes our other dairy products" clearly represents that petitioner's oleomargarine is a dairy product. The Commission is not required to sample public opinion to determine what meaning is conveyed to the public by particular advertisements. *Zenith Radio Corporation* v. *Federal Trade Commission*, 7 Cir. 1944, 143 F. 2d 29, 31; see also *New American Library of World Literature* v. *Federal Trade Commission*, 2 Cir. 1954, 213 F. 2d 143, 145. The Commission, which is deemed to have expert experience in dealing with these matters, *Federal Trade Comm'n* v. *R. F. Keppel & Bro., Inc.*, 1934, 291 U. S. 304, 314, is entitled to draw upon its experience in order to determine, in the absence of consumer testimony, the natural and probable result of the use of advertising expressions. *Siegel Co.* v. *Federal Trade Comm'n*, 1946, 327 U. S. 608, 614; *Federal Trade Comm'n* v. *Hires Turner Glass Co.*, 3 Cir. 1935, 81 F. 2d 362, 364. Since the Commission's findings of fact are not clearly unreasonable and are based on substantial evidence, they cannot be set aside.

Appendix A

In reviewing the initial decision of the hearing examiner, the Commission, *sua sponte*, determined that it had no authority to include in a cease-and-desist order under §15(a)(2) a proviso permitting the unrestricted use of the name of a dairy product which is an ingredient of an oleomargarine even if accompanied by a statement of the percentage thereof. The Commission, therefore, has asked us to modify its order by striking from the proviso to paragraph 1 of its order the following language: "or a truthful statement that said product contains butter or any other dairy product provided the percentage thereof contained is clearly and conspicuously set forth." The Commission's requested modification is unopposed and should be granted. The proviso as modified will read:

> "Provided, however, that nothing contained in this order shall prevent the use in advertisements of a truthful, accurate and full statement of all of the ingredients contained in such product."

The order of the Commission is affirmed as modified.

APPENDIX B

Final Decree Affirming and Enforcing Order to Cease and Desist

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 23724

E. F. DREW & CO., INC.,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

E. F. Drew & Co., Inc., petitioner herein, having filed in this Court on July 7, 1955, a petition for review of and to set aside an order issued against it on May 5, 1955, by the Federal Trade Commission, respondent herein, in a proceeding before it entitled "In the Matter of E. F. Drew & Co., Inc., a corporation, Docket No. 6126"; and a copy of said petition having been served upon respondent; and respondent having thereafter certified and filed herein, as required by the Federal Trade Commission Act, a transcript of the entire record in the said proceedings; and the matter having been heard on briefs and oral argu-

ment on February 9, 1956, including the request of the Commission that this Court modify the aforesaid order to cease and desist by striking therefrom the following proviso to Paragraph 1 thereof: "or a truthful statement that said product contains butter or any other dairy product providing the percentage thereof contained is clearly and conspicuously set forth"; and this Court having fully considered the cause and the aforesaid request for modification and having rendered its decision on July 13, 1956, in which it affirmed and sustained the findings and conclusions of the Commission, modified the aforesaid order to cease and desist as requested and affirmed said order as modified:

Now, Therefore, It Is Hereby Ordered, Adjudged and Decreed that the aforesaid petition be, and it hereby is dismissed, that the aforesaid order to cease and desist be, and it hereby is, modified by striking therefrom the aforesaid proviso, and as hereby modified be, and it is hereby, affirmed and enforced, and that petitioner be, and it hereby is, commanded to obey said order and to comply therewith; and

It Is Hereby Further Ordered, Adjudged and Decreed, that within ninety days after the entry of this decree petitioner shall file with the Federal Trade Commission a report in writing setting forth in detail the manner and form in which it has complied with said order to cease and desist

Without prejudice to the right of the United States, as provided in Section 5(1) of the Federal Trade Com-

mission Act, to prosecute suits to recover civil penalties for violation of the aforesaid order to cease and desist, hereby affirmed and enforced, and without prejudice to the right of the Federal Trade Commission to institute and maintain contempt proceedings for violation of this decree, this Court retains jurisdiction of this cause to enter such further orders herein from time to time as may become necessary effectively to enforce compliance in every respect with this decree and to prevent evasion thereof.

By the Court:

HAROLD R. MEDINA
STERRY R. WATERMAN
United States Circuit Judges

Date: August 20, 1956

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In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 578

E. F. DREW & CO., INC.

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the Second Circuit (Pet. 1a-11a) is reported in 235 F.2d 735.

JURISDICTION

The final decree affirming and enforcing the order of the Federal Trade Commission as modified (Pet. 12a-14a) was entered on August 20, 1956. The petition for a writ of certiorari was filed on November 14, 1956. The jurisdiction of the Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether provisions of the Federal Trade Commission Act which make it unlawful to disseminate through the mails or in interstate commerce any representation that oleomargarine is a "dairy product" constitute an abridgement of freedom of speech, in violation of the First Amendment.[1]

STATUTE INVOLVED

The pertinent provisions of the Federal Trade Commission Act, as amended, are as follows:

> Sec. 5. [as amended, 66 Stat. 632, 15 U.S.C. 45(a)] (a) (1) * * * unfair or deceptive acts or practices in commerce, are hereby declared unlawful.
>
> * * * * *
>
> (6) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, * * * from using * * * unfair or deceptive acts or practices in commerce.
>
> Sec. 12. [as added, 52 Stat. 114, 15 U.S.C. 52] (a) It shall be unlawful * * * to disseminate, or cause to be disseminated, any false advertisement—
>
> (1) By United States mails, or in commerce by any means, for the purpose of inducing, or which

[1] The petition presents two further questions, whether Section 15(a)(2) of the Act is so ambiguous that it is violative of the due process clause of the Fifth Amendment, and whether Section 5 of the Act applies to violations of Section 15(a)(2). We shall not discuss these questions because (1) the petition does not undertake to show that these questions were erroneously decided, and (2) the opinion of the court below clearly and convincingly disposes of both questions (Pet. 6a-7a, 8a-9a).

is likely to induce, directly or indirectly the purchase of food * * *; or

(2) By any means, for the purpose of inducing, or which is likely to induce, directly or indirectly, the purchase in commerce of food * * *.

(b) The dissemination or the causing to be disseminated of any false advertisement within the provisions of subsection (a) of this section shall be an unfair or deceptive act or practice in commerce within the meaning of section 5 of this title.

Sec. 15. [as added, 52 Stat. 116, and as amended, 64 Stat. 21, 15 U.S.C. 55] For the purposes of sections 12, 13, and 14—

(a)(1) The term "false advertisement" means an advertisement, other than labeling, which is misleading in a material respect; and in determining whether any advertisement is misleading, there shall be taken into account (among other things) not only representations made or suggested by statement, word, design, device, sound, or any combination thereof, but also the extent to which the advertisement fails to reveal facts material in the light of such representations * * *.

(2) In the case of oleomargarine or margarine an advertisement shall be deemed misleading in a material respect if in such advertisement representations are made or suggested by statement, word, grade designation, design, device, symbol, sound, or any combination thereof, that such oleomargarine or margarine is a dairy product, except that nothing contained herein shall prevent a

truthful, accurate, and full statement in any such advertisement of all the ingredients contained in such oleomargarine or margarine.

STATEMENT

Petitioner, a Delaware corporation, sells and distributes in interstate commerce oleomargarine, under the name "Farm Queen," to dairies and others for resale and delivery to consumers. Petitioner disseminated in interstate commerce and through the mails advertisements, circulars, and letters describing its oleomargarine as "churned to delicate, sweet creamy goodness," "country fresh," "the same day to day freshness which characterizes our other dairy products."

The Federal Trade Commission charged petitioner with engaging in unfair and deceptive acts and practices in commerce, in violation of Section 15(a)(2) of the Federal Trade Commission Act, in that petitioner's advertisements suggested and represented that its oleomargarine was a dairy product. After a hearing, the Commission issued a cease and desist order prohibiting the use of the above-quoted terms, but not the trade name "Farm Queen." While the Commission made no finding that the terms were false and misleading, it did find that by the use of these terms petitioner had represented or suggested that its margarine is a dairy product.

On appeal, the court of appeals modified the Commission's order in a manner not here material, and otherwise affirmed the order. The court held that in a case coming within Section 15(a)(2) of the Trade Commission Act the Commission is not required to find that the advertisement is in fact false and misleading;

that the statute is unambiguous; and that Section 5 of the Act authorizes the Commission to issue cease and desist orders for violations of Section 15(a)(2). The court also held that Section 15(a)(2), as so construed, was not an unconstitutional abridgement of freedom of speech.

ARGUMENT

Section 12(a) of the Federal Trade Commission Act makes it unlawful to disseminate by mail or in interstate commerce any "false advertisement" intended to induce purchase of food. Sections 15(a)(1) and (2) provide that, for the purposes of Section 12, the term "false advertisement" means one which is "misleading in a material respect", and that an advertisement representing that oleomargarine is "a dairy product" shall be deemed misleading in a material respect. Congress thus made its own determination that this is a materially misleading representation and prohibited its use in interstate commerce. In effect and purpose, the statute parallels the Filled Milk Act, which prohibits shipping "filled milk" in interstate commerce.[2] This absolute prohibition, adopted in part for the purpose of preventing confusion by the purchasing public between processed natural milk and manufactured food compounds, has been held to be a valid exercise of federal commerce power. *Carolene Products Co.* v. *United States,* 323 U.S. 18, 22-25, 28-32.

Irrespective of whether commercial advertising is

[2] "Filled milk" is defined as being any milk, whether or not condensed, evaporated, dried, etc., to which any fat or oil other than milk fat had been added, so that the resulting product resembles any form of milk, whether or not condensed, evaporated or dried (21 U.S.C. 61(c)).

within the protection of the First Amendment,[3] the constitutional guaranty of freedom of speech is not a limitation upon exercise by Congress of its powers, particularly over the mails and interstate commerce, to protect people against fraud or misrepresentation. *Donaldson* v. *Read Magazine*, 333 U.S. 178, 190-191. In the *Donaldson* case, this Court stated that statutes of this kind have been "regularly enforced by the executive officers and the courts for more than half a century" and "are now part and parcel of our governmental fabric"; and that their constitutionality had been upheld in *Public Clearing House* v. *Coyne*, 194 U.S. 497, and had not been questioned in any earlier or later decision of this Court (*ibid.*).

The courts have sustained innumerable orders of the Federal Trade Commission issued under Section 5 of the Trade Commission Act which prohibited particular representations found to be misleading or deceptive, and in none of these decisions has it been suggested that the Commission's action raised constitutional questions. Plainly, there is even less basis for attack where, as here, Congress itself has determined the deceptive character of the representation and has made it the subject of a specific prohibition.

The opinion of the court below aptly sets forth the extremely tenuous basis for petitioner's First Amendment contention. The court said (Pet. 8a):

> Nor is the slight and incidental limitation of speech necessary to avoid the danger of public deception an infringement of the First Amendment.

[3] See *Valentine* v. *Chrestensen*, 316 U.S. 52, 54; *Breard* v. *Alexandria*, 341 U.S. 622, 641-642; *Pollak* v. *Public Utilities Commission*, 191 F.2d 450, 457 (C.A. D.C.), reversed on other grounds, 343 U.S. 451.

Petitioner remains free to advertise its product. It is prohibited only from representing or suggesting that its product is a dairy product. "It is not difficult to choose statements, designs and devices which will not deceive." *United States* v. *95 Barrels of Vinegar*, 1924, 265 U.S. 438, 443.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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DECEMBER, 1956.

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IN THE

Supreme Court of the United States

October Term, 1956

No. 578

E. F. DREW & CO., INC.,

Petitioner,

against

FEDERAL TRADE COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Introduction

In view of Respondent's opposing brief, we desire to state as simply as we can, what we are not pleading for, what we are pleading for, and what we are pleading against.

We do not plead for the right to circulate misleading advertising. We do plead for the right of a determination

by a fact finding body, whether the advertisements that we did disseminate, are in fact misleading. We plead against the right of Congress to an unreviewable judgment that given speech restriction is necessary to prevent a given evil. We plead against the right of Congress to an unreviewable judgment that the evil to be avoided justifies given speech restriction. We plead against the power of Congress to abridge speech freedom by its own previous factual determination that the use of particular expressions make an advertisement misleading.

Fallacies of Respondent's Argument

A very careful reading of the argument contained in Respondent's opposing brief, leaves the Petitioner with the distinct impression that we did not succeed in making ourselves clear in our petition, for the Respondent, instead of arguing against our contentions, ignores our arguments entirely and merely repeats what was said in the opinion of the Court below and in doing so, has gone somewhat further, we believe, than the Court of Appeals. We may summarize Respondent's arguments as follows:

1. The purpose of Section 15(a)(2), was to prevent confusion by the purchasing public, and evidently analogizing Section 15(a)(2) to the Filled Milk Act, Respondent maintains that since, under the *Carolene* case, Congress had the power under the commerce clause, to prevent confusion by the purchasing public between processed natural milk and manufactured food compounds in the way that Congress accomplished this, in that case, Congress like-

wise has the power to prevent confusion between margarine and butter in the way that it has attempted to do in Section 15(a)(2).

2. That the first amendment does not deprive Congress of its power to protect people against fraud or misrepresentation in interstate commerce, citing *Donaldson* v. *Read Magazine,* 333 U. S. 178, 190-191.

3. That the Courts have sustained Federal Trade Commission orders under Section 5 prohibiting particular representations found by the Federal Trade Commission to be deceptive, and since it is Constitutional for the Federal Trade Commission to do so, it is likewise Constitutional for Congress to determine "the deceptive character of the representation" and make it a subject of specific prohibition.

4. That the slight and incidental limitation of speech necessary to avoid the danger of public deception is not an infringement of the first amendment since Petitioner remains free to advertise its product and since it is only prohibited from representing or suggesting that its product is a dairy product.

We shall deal with each of these conditions *seriatim.*

1. The power of Congress upheld in the Filled Milk Act by the *Carolene* case offers no analogy whatsoever to the question presented here. In the *Carolene* case, this Court refused to interfere with a congressional factual determination that the sale of filled milk necessarily would mislead the public. This Court's holding in that case how-

ever, was not based upon its agreement with the congressional finding of fact nor with the congressional determination that the prohibition of the sale of filled milk was necessary to prevent misleading the public. This Court's ruling in that case was predicated upon the well established construction of the *due process clause.* This Court has repeatedly held that under the due process clause, congressional power is only limited by the due process standard of rational basis, and since in that case this Court felt that there was a reasonable basis for the congressional action and that it was not arbitrary, it upheld the congressional enactment.

The question presented here, however, does not involve the due process clause. The question here is, whether the congressional enactment challenged, *constitutes an abridgement of the freedom of speech.* If there is anything that is now well and firmly established, it is that, in determining the extent of congressional power curtailment under the first amendment, the Federal Courts are not at all bound by congressional determinations of fact, or by congressional determination that abridgement of speech is necessary to avoid a particular evil. That is the holding of the *Dennis* case, of *Thomas* v. *Collins,* of *Herndon* v. *Lowry.* This Court of course, may overrule those decisions. It may adopt the reasoning of Mr. Justice Frankfurter and hold that free speech, like due process, is limited only by rational basis. If it does so, however, it clearly will be overturning established constitutional construction.

2. If we understand Respondent correctly, Congress under the commerce power may take any action that *it* deems necessary to protect people against fraud or mis-

representations, and if Congress feels that it is necessary to abridge the freedom of speech in order to accomplish this, the first amendment is powerless to prevent it. We presume by this, Respondent means that congressional power under the commerce clause overrides any restriction seemingly placed upon Congress by the first amendment. If this is so, it is indeed a revelation. The very wording of the first amendment, without more, would seem to refute this. Just what can the first amendment possibly mean, when it says: "Congress shall make no law abridging the freedom of speech", if Congress by virtue of another power may abridge the freedom of speech. Now we freely concede that the first amendment does not deprive Congress of the power to curtail speech freedom *in the absolute* sense. This however, is not because of a positive grant of power in the Constitution; it is because the first amendment has never been construed to be an absolute limitation. It is because, by a process of judicial construction, the first amendment has been interpreted to give way to certain necessities.

We freely concede that, for this reason, Congress has the power to prohibit the circulation of *misleading advertising*. We freely concede that Congress has the power to forbid the dissemination of advertisements that have the capacity and tendency to deceive or confuse. We do not concede however, that Congress has the power, in spite of the first amendment, to determine in *advance* of *an actual advertisement* that the use of particular words or expressions necessarily make an advertisement containing them, misleading regardless of the other contents in the advertisement, nor do we concede that a congressional determination that particular speech restriction is neces-

sary to avoid a given evil, is binding upon the Federal Court when it is called upon to determine whether an Act of Congress violates the first amendment. Section 15(a)(2), we maintain, violates the first amendment simply because it has attempted to preclude an inquiry respecting any particular advertisement as to whether such advertisement is misleading or not. If Congress can prohibit the use of a class of words by the simple device of declaring that such words are *deemed* misleading, then this, it is submitted, would effectively eliminate the first amendment from the Constitution. This furnishes the distinction between the Act of Congress upheld in the *Donaldson* case (39 U. S. C. A. §§259, 732) and Section 15(a)(2). The Act in question in *Donaldson* gave the Postmaster General the authority to return mail which was part of a scheme for obtaining money under false pretenses or representations. It did not set forth, let us say, that any printed matter which contained this or that suggestion was to be *deemed* to be part of a scheme to obtain money under false representations. The Act of Congress involved in *Donaldson* is the equivalent, of Section 5, 12 and 15 of the Federal Trade Commission Act *before* the addition of Section 15(a)(2).

3. We do not see at all that the Act of Congress which we question, is constitutional, simply because the Courts have sustained many orders of the Federal Trade Commission which prohibited particular representations found by the *Federal Trade Commission* to be misleading or deceptive. This contention of the Respondent misses our point entirely. The absence of a finding of deception by the Federal Trade Commission, is exactly what we are

complaining about. If the Federal Trade Commission had examined into the question as to whether our advertisements were in fact, deceptive and had found them to be deceptive, while we would violently disagree with the Federal Trade Commission's finding, we presume no constitutional question would be involved. Our complaint is that the Federal Trade Commission has *refused to conduct an inquiry* as to whether our advertisements were in fact deceptive. The Federal Trade Commission has taken the position, and has been sustained by the Court of Appeals, that Section 15(a)(2), *precludes* such an inquiry, and that they are bound by the *previous factual determination of Congress.*

4. We declare most vehemently that the speech limitation imposed upon us, is neither slight nor incidental. In one sense, there is no such thing as a slight abridgement of speech. If one's mouth is closed, it makes little difference whether it is held shut by a clamp, monkey wrench or hydraulic press. Any restriction of speech is a matter never to be taken lightly. As we have freely conceded, there are situations where speech invasion is necessary and involves the prevention of an evil of so grave a nature as to be justified. Perhaps, the best example of such necessity and justification, is the Act of Congress in question in the *Dennis* case; yet even there where the purpose of the Act was to prevent the destruction of Government itself, two Justices of this Court dissented and the majority and concurring Justices were evidently so troubled by the necessity of upholding speech invasion, that their combined opinions comprised 84 printed pages. We do not see the relevancy of the contention that we are not pre-

vented from advertising our product, nor that "it's not difficult to choose statements, designs and devices which will not deceive". This furnishes a classic example of begging the question. Our whole complaint is predicated upon the fact that our advertisements *did not deceive* and especially upon the fact that neither the Federal Trade Commission nor the Court of Appeals, has found that our advertisements were deceptive. It affords us little comfort to be told that we are permitted to advertise as long as we do not suggest that our product is a dairy product. We have pointed out in our petition, that the nature of our product is such, that it would be impossible to avoid such a suggestion, unless we are content to eliminate from our advertising the chief virtues of our product. If particular expressions suggest butter to the mind of the public, we see no danger in this if our advertisements as a whole are not deceptive or confusing.

We might add that while it is argued that the purpose of Section 15(a)(2) is to prevent confusion between margarine and butter (Pet. 6a footnote) the section itself does not mention the word butter at all but uses the word *dairy product,* whatever that might mean. Strangely enough by definition contained in a Regulation promulgated under the Food and Drug Act, margarine must contain milk or cream, without limit as to percentage and may contain butter without limit as to percentage (Pet. 7) and hence margarine itself is a dairy product.

As for the speech abridgement being only incidental, we are wondering how any speech invasion could ever be more direct than one which restricts *speech content.*

Correcting Inaccuracies of Respondent's Opposing Brief

1. Respondent on page 2 of the opposing brief has attempted to restate the first question which we, in our petition submitted as being fairly presented. In doing so, we believe that respondent has not only misstated the question presented, but has stated it much more favorably to respondent than is warranted. In support of petitioner's statement of the question, we need only refer to the opinion of the Court of Appeals, which in referring to the questions presented states: "(2) If Section 15(a)(2) of the Act, 15 U. S. C. Section 55(a)(2), is construed so as to make such proof [that the oleomargarine advertisements are of a misleading character] unnecessary, is that subsection constitutional (Matter in brackets Our's) (Pet. 3a).

Moreover, as construed by the Federal Trade Commission and by the Court of Appeals, Section 15(a)(2) not only condemns oleomargarine advertisements containing *representations* that the product is a dairy product but also advertisements which contain *suggestions* that the product is a dairy product. We quote again from the opinion of the Court of Appeals. "Since the word 'suggested' modifies the word 'representations' it is clear that any oleomargarine advertisement which *represents or suggests* in any manner that it is a dairy product is 'misleading in a material respect' and hence, because of the provisions of Section 15(a)(1), is a 'false advertisement' within the meaning of Section 12" (Pet. 5a). Obviously forbidding a mere *suggestion* that the product is a dairy product is not the same as forbidding a representation

that it is a dairy product. And in this case Section 15(a)(2) has been construed by the Federal Trade Commission to require only the *suggestion,* as a requisite to a cease and desist order. Thus in the last paragraph of the opinion of the Federal Trade Commission we have: "This is not to say that all dairy terms, as such, are precluded. They are prohibited only when they *suggest* to the reader that the product is a dairy product." (Emphasis supplied.) (Transcript p. 38)

2. In a footnote, on page 2 of the opposing brief, the statement is made that the respondent has not discussed the second and third questions (Pet. 3) presented because (1) the petition does not undertake to show that these questions were erroneously decided, and (2) the opinion of the Court below clearly and convincingly disposes of both questions. In this connection we are impelled to state (a) that we did make an attempt to show that the second question was erroneously decided (Pet. 11), and (b) we certainly cannot subscribe to the contention that the opinion of the Court below convincingly disposes of both questions.

It is true that our argument of the second question presented, can hardly be characterized as exhaustive, and it is also true that we made no argument whatsoever respecting the third question presented. We desire, however, to state most emphatically that we are not abandoning the second and third question. We dealt with them as we did for the obvious reason that we had no hope that our petition would be granted if only the second and third questions were presented, in view of *Reddi Spread Corpo-*

ration v. *F. T. C.*, 3rd Cir. 1956, 229 F. 2d 557. It is not to be inferred from this, however, that we are any less serious about the second and third questions presented.

The writ of certiorari should be issued.

Respectfully submitted,

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Attorney for Petitioner.

Dated: New York, N. Y., December 20th, 1956.